UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of VERIZON NEW ENGLAND, INC. and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2324, AFL-CIO	Cases: 1-CA-44539 1-CA-44556 1-CA-44612

VERIZON NEW ENGLAND, INC.'S ANSWERING BRIEF TO ACTING GENERAL COUNSEL'S AND CHARGING PARTY'S EXCEPTIONS

Arthur G. Telegen
atelegen@seyfarth.com
John E. Duke
jduke@seyfarth.com
Seyfarth Shaw LLP
Two Seaport Lane, Suite 300
Boston, MA 02210-2028
Phone: (617) 946-4800
Fax: (617) 946-4801

Table of Contents

Page

Table of Authorities

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Respondent Verizon New England, Inc. ("VNE" or the "Company") submits this answering brief to the Acting General Counsel's and the International Brotherhood of Electrical Workers, Local 2324's (the "Union") exceptions to the decision of the Administrative Law Judge ("ALJ") in the above-referenced matter in accordance with Section 102.46(d) of the National Labor Relations Board's Rules and Regulations.

Introduction

The Acting General Counsel, supported by the Union, seeks to abolish deferral. They explain in detail why they think that the Board could have interpreted the collective bargaining agreement differently than did a noted, experienced arbitrator.[1] But nowhere in their papers do the Acting General Counsel or the Union explain why this difference equates to "repugnance" to the Act. The reason why they assay no such analysis is that they seek to abolish deferral. As they would have it, no award can stand unless it mirrors the Board's *post hoc* analysis of the collective bargaining agreement.

Such an attack does violence to the importance of arbitration to the collective bargaining regime established by Congress. First, if the Acting General Counsel is right, deferral is non-existent because there is no reason ever to defer to arbitration just to test whether an arbitrator can predict how the Board will read a collective bargaining agreement. Second, if the Board adopts his position, Congress's placement of arbitration as a cornerstone of federal labor policy is displaced. *See* 29 U.S.C. § 151 ("It is hereby declared to be the policy of the United States to … encourag[e] … the practice and procedure of collective bargaining"); 29 U.S.C. § 173(d) ("Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing

[1] And differently from a noted, experienced Regional Director.

collective bargaining agreement"); *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Finally, the Acting General Counsel's position renders the limited judicial review of arbitration awards largely academic in any case involving statutory rights.

It is ironic that the Acting General Counsel would undermine federal labor policy to protect the placement of picket signs in car windows. This case was deferred to arbitration by the General Counsel specifically because "the question of whether the Employer properly relied on any provision of the collective bargaining agreement to require the employees to stop displaying union signs inside of their personal vehicles that were parked on company premises will be decided by the arbitrator." Jnt. Ex. 8. But having had the collective bargaining agreement interpreted by a renowned arbitrator, the Acting General Counsel would turn federal labor policy topsy-turvy to reject a reading with which he does not agree.

The Board should adopt the ALJ's decision.

Facts

The parties stipulated to all of the facts in this case.[2] VNE was party to a collective bargaining agreement (the "CBA") that expired on August 2, 2008 covering so-called "plant" employees in Massachusetts and Rhode Island. Jnt. Stip. 6. The "plant" bargaining unit is represented by various Local unions of the International Brotherhood of Electrical Workers, including Local 2324. Jnt. Stip. 6. Those various Local unions together comprise the System Council T-6, which acts as bargaining agent. Jnt. Stip. 6. While each of the Locals in the

[2] Accordingly, the Acting General Counsel's exceptions to the ALJ's factual findings are argument more than exceptions.

System Council T-6 administers the collective bargaining agreement in its geographic area, the bargaining unit is not divided along geographic lines. Jnt. Stip. 6.

The collective bargaining agreement contained a broad prohibition on picketing in Article G10. Article G10 provided:

> The Union agrees that during the term of this Agreement, or any extension thereof, it will not cause or permit its members to cause, nor will any member of the Union take part in, any strike of or other interference with any of the Company's operations or picketing of any of the Company's premises; provided, however, that nothing in this Article shall in any way enlarge, diminish or affect whatever rights and obligations of the parties are now or may be from time to time with respect to any refusals to cross lawful picket lines established by other Unions at locations other than the Company's premises.

Jnt. Ex. 2. This language has remained unchanged in the parties' collective bargaining agreement since 1977. Jnt. Stip. 7. The collective bargaining agreement also contained grievance and arbitration provisions permitting the Union to demand arbitration before a tripartite Board of Arbitration consisting of a Union-appointed arbitrator, a Company-appointed arbitrator, and a neutral arbitrator selected by the parties where "the intent and meaning of one or more of the Articles of the Agreement … has been violated by the Company" if certain procedural prerequisites have been met. Jnt. Ex. 2. The collective bargaining agreement did not permit VNE to grieve or to demand arbitration. *See* Jnt. Ex. 2.

Notwithstanding Article G10's picketing prohibition, the Union has engaged in "informational picketing" of Company facilities over the years. Jnt. Stip. 8. This informational picketing was most common when contracts were nearing expiration. Jnt. Stip. 8. Employees engaged in informational picketing would arrive at work before the start of their shifts and carry picket signs either on the sidewalk in front of a Company facility or in a nearby public area. Jnt. Stip. 8. While the Company believes the Union violates Article G10 every time it engages in, or

permits its members to engage in, such picketing, the Company tolerated the Union's conduct, and the Union for its part kept its picketing off Company property. *See* Jnt. Stip. 8.

In the spring of 2008, however, the Union brought the picketing onto Company property. In preparation for contract negotiations that were to take place in August of that year, the Union planned a round of informational picketing for April of 2008. *See* Jnt. Stip. 9. In March of 2008, the Union distributed picket signs to employees, which contained language to the effect of "Verizon, Honor Our Contract -- IBEW Systems Council T-6". Jnt. Stip. 9; Jnt. Ex. 3. The signs were large, with lettering that was intended to be legible from a distance. *See* Jnt. Ex. 3. As it had done many times before, beginning in mid-March 2008, bargaining unit employees started picketing in front of some of the Company's facilities before reporting to work. Jnt. Ex. 4. But when it came time to report to work, employees of at least three Company garages -- those in Hatfield, Springfield, and Westfield, Massachusetts -- placed their picket signs in the windshields of their cars, which were parked in Company-owned parking lots. Jnt. Stip. 11-14; Jnt. Ex 4. The signs remained in plain sight, essentially bringing the picketing onto Company property.

The Westfield employees were the first to display picket signs in their cars. Jnt. Stip. 12. After receiving the signs from the Union on March 18, they displayed the picket signs in their cars on Thursday, March 20 and Friday, March 21. Jnt. Stip. 12. They did so because their informational picketing was not scheduled to begin for several weeks. Jnt. Stip. 12. The Westfield garage is located in an area containing both businesses and private residences, and employees of at least two neighboring businesses, Penske and Agway, travel through the Company's parking lot. Jnt. Stip. 12. The signs were visible to VNE employees and managers,

employees of Penske and Agway, and any vendors or delivery drivers visiting the garage. Jnt. Stip. 12.

The Springfield employees began displaying picket signs in their cars during the first week of April. Jnt. Stip. 11. The signs were displayed in cars every day that week. Jnt. Stip. 11. Unlike the Westfield garage, the parking lot of the Springfield garage borders the road. Jnt. Stip. 11. A line of about 30 cars with signs was visible from the street. Jnt. Stip. 11. Matthew MacDonnell, the Springfield Union steward, admitted that he intended this display to leave passersby with the impression that the Company was not honoring its contract with the Union. Jnt. Ex. 9, pp. 121, 127-128. He also conceded that passersby could conclude that the Union was on strike. Jnt. Ex. 9, pg. 128.

The employees of the Hatfield garage displayed their picket signs in their cars beginning on April 23, 2008, the day before they began informational picketing. Jnt. Stip. 13. The parking lot of the Hatfield garage is not visible from the street, but the picket signs were visible to VNE's employees and managers, as well as visiting vendors and delivery drivers. Jnt. Stip. 13.

While the Company has tolerated informational picketing in public spaces adjoining its properties for years, it was unwilling to allow picket signs to be displayed *en masse* in its parking lots. When the Company asked the employees at these three garages to remove the signs from their car windows, they did so without incident. Jnt. Stip. 11-13. No one was disciplined, and the Company did not otherwise impede the Union's informational picketing campaign. The Westfield employees were allowed to picket at the end of the Company's driveway, in public space. Jnt. Stip. 12. The Springfield workers picketed in the street in front of VNE's garage. Jnt. Stip. 11. The Hatfield workers did their informational picketing about ½ mile down the road from their garage, in another parking lot where they were visible from the street. Jnt. Stip. 13.

The Union filed three unfair labor practice charges with Region 1 alleging that the Company interfered with its employees' right to engage in protected concerted activity by requiring them to remove the signs from their cars while parked on Company property. Jnt. Stip. 15; Jnt. Ex. 1(a), 1(c), 1(e). On May 21, 2008, Region 1 deferred two of the charges to the grievance and arbitration procedures of the collective bargaining agreement. Jnt. Ex. 5, 6. Region 1 deferred the third charge on June 18, 2008. Jnt. Ex. 7. The Region deferred because "the dispute here involved arises from the contract between the parties, and … the contractual grievance-arbitration procedures are available for resolving the dispute." Jnt. Ex. 7.

The Union appealed the Region's deferral decision. However, on July 22, 2008, the General Counsel denied the appeal. The General Counsel reasoned that the statutory issue depended on the meaning of the collective bargaining agreement:

> It is anticipated that the question of whether the Employer properly relied on any provision of the collective bargaining agreement to require the employees to stop displaying union signs inside of their personal vehicles that were parked on company premises will be decided by the arbitrator.

Jnt. Ex. 8.

After the Union's appeals of the deferral decisions were denied, the Union grieved the issue of whether the Company violated the collective bargaining agreement by requesting employees to remove the signs and pressed the grievance to arbitration. Jnt. Stip. 17. An arbitration hearing was held on October 26, 2009 before Arbitrator Timothy Bornstein at which the Union presented six witnesses and the Company presented one. Jnt. Stip. 18. Arbitrator Bornstein is one of a handful of arbitrators the parties have regularly selected to resolve contractual disputes and is an editor of a noted labor arbitration treatise. Jnt. Stip. 21. *See Labor & Employment Arbitration* (2d ed., Tim Bornstein, Ann Gosline and Marc Greenbaum eds., 1997 & Supp. 1998-2010); *Rhode Island Carpenters Annuity Fund v. Trevi Icos Corp.*, 533 F. Supp.

2d 246, 251 n.4 (D.R.I. 2008) ("Arbitrator Bornstein is perhaps one of the most respected labor arbitrators in this region, if not the entire country. He is the author of thousands of decisions as well as the co-editor of a widely cited and highly regarded labor law arbitration treatise."). Both parties were afforded the opportunity to examine and cross examine each witness. Jnt. Stip. 18. The Union and the Company submitted post-hearing briefs detailing their respective positions. Jnt. Stip. 12; Jnt. Ex. 10, 11.

On January 20, 2010, Arbitrator Bornstein issued a draft award ruling that VNE acted within its rights when it asked employees to stop displaying the signs in their cars because such conduct constituted "picketing" and, therefore, violated Article G10. Jnt. Stip. 19; Jnt. Ex. 12. On March 11, 2010, following an executive session by the Board of Arbitration, a final award was issued, which included a written dissent by the Union's representative on the Board. Jnt. Stip. 20; Jnt. Ex. 13.

On August 27, 2010, the Region deferred to the arbitration award and dismissed the Union's charges. Jnt. Stip. 22; Jnt. Ex. 14. The Region determined that the proceedings were fair and regular; the parties had agreed to be bound by the results of the proceeding; the unfair labor practice issue alleged in the charges was presented to, and considered by, the arbitrator; the contractual issue was factually parallel to the unfair labor practice issue; the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice; and the award was not in conflict with the purposes or policies of the Act. Jnt. Stip. 22; Jnt. Ex. 14. The Region reached this conclusion because:

> Here, the unfair labor practice issue is whether the Employer violated employees' Section 7 right by requiring employees to remove picket signs from their personal vehicles on the Employer's property. The issue presented to the Arbitrator was: Whether management violated the parties' contract when it required removal of Union protest signs from employees' vehicles parked on Company property. Both the unfair labor practice and the grievance contemplate the same actions by

> the employees, putting the picket signs in the cars and the same actions by the Employer, requiring the removal of those signs. Therefore the issues are factually parallel.
>
> In regard to your claim that the arbitrator's award was repugnant to the Act, the Board will not find an award is clearly repugnant unless it is shown to be palpably wrong, i.e., not susceptible to an interpretation consistent with the Act. The arbitrator's finding that the collective-bargaining agreement prohibited picketing on the Employer's premises and the union signs constituted picketing is susceptible to an interpretation [consonant] with the Act and, therefore, is not repugnant.

Jnt. Ex. 14.

On September 15, 2010, the Union appealed the Region's dismissal. Jnt. Stip. 23. But before the Office of Appeals reached a decision, the Region conducted further investigation and concluded on February 14, 2011 that deferral to the award was not appropriate because the arbitrator's "conclusion that the Union's conduct of seeking to communicate a message by displaying signs in parked vehicles constituted picketing was overly broad and, therefore, repugnant to the Act." Jnt. Stip. 23; Jnt. Ex. 15. However, the Region still dismissed the charges, employing reasoning similar to the arbitrator's:

> After further investigation, the Region found that the Union's informational picketing against the Employer was an area-wide effort that began two weeks prior to the Employer's prohibition against sign posting in employee vehicles on the Employer property. Further, the directive to remove the signs at the locations at issue in your charges began one day prior to traditional picketing at two of the three locations at issue and within a couple of weeks at the third location. I note that the Union made and distributed the picket signs for the purpose of engaging in informational picketing, conduct the Union had a practice of engaging in prior to the expiration of prior contracts. Accordingly, it is reasonable to conclude that the conduct engaged in here was part and parcel of an area-wide picketing campaign in furtherance of a labor dispute rather than the mere placement of signs in employee vehicles on company property. This finding is consistent with the Board's recent case on bannering. In *United Brotherhood of Carpenters and Joiners of America (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (August 27, 2010), the Board acknowledged that there are prior Board decisions finding picketing during periods when there was no patrolling or other ambulation, and found those cases distinguishable because the display of stationary signs or distribution of handbills in those cases was preceded at the same location or accompanied at other locations by traditional ambulatory

> picketing and, in many instances, the same signs were displayed that had been utilized in traditional picketing. Accordingly, the Employer, relying on that portion of the parties' collective-bargaining agreement in which the Union clearly and unequivocally waived the employees' right to picket on the Employer's premises, lawfully directed employees' to remove signs from vehicles parked on the Employer's premises. I note that the Employer's directive was narrowly tailored to restrict picketing on the Employer's property in accordance with the parties' collective-bargaining agreement.

Jnt. Stip. 23; Jnt. Ex. 15.

The Union appealed this dismissal on or about March 6, 2011. Jnt. Stip. 23. On June 2, 2011, the Union's appeal was sustained without explanation and the instant complaint issued shortly thereafter. Jnt. Stip. 24; Jnt. Ex. 16.

On November 15, 2011, after an exhaustive review of prior Board decisions involving deferral to arbitration awards, the ALJ held that "although the Board, upon hearing this case *de novo*, might have reached a different conclusion than that reached by the arbitrator, finding that the signs in the vehicle windows was not picketing and were protected, the arbitrator's decision was neither repugnant to the Act nor was it palpably wrong," ALJ Decision, pg. 11, deferred to the arbitrator's decision, and recommended dismissal of the complaint in its entirety.

Argument

I. "Clear And Unmistakable Waiver" Is Not A Contract Principle Imposed On Arbitrators.

The underlying premise of the Acting General Counsel's analysis, stated over and over again, is that the arbitrator acted beyond his authority by not considering whether the Union "clearly and unmistakably" waived employees' ability to place picket signs in their cars parked on the Company's property even when they have abandoned the right to carry those same picket signs around on public property. The Company does not understand the Acting General Counsel to contend that parties to a collective bargaining agreement cannot waive the right to picket. Nor does the Company believe the Acting General Counsel's argument to be that parties to a

collective bargaining agreement cannot agree that employees will not put picket signs in the windows of their cars while parked on their employer's property.

Thus, while the Acting General Counsel does not assert that displaying picket signs in car windows is a non-waivable right, he claims that the right was not waived here. Arbitrator Bornstein interpreted the collective bargaining agreement and found: (1) the Union waived its right to picket in Article G10, (2) displaying the same signs used in picketing in employees' cars parked on VNE's property was picketing, and, therefore, (3) the Union waived the right to display these picket signs in employees' vehicles parked on Company property. The Acting General Counsel disagrees. When the Acting General Counsel reads the collective bargaining agreement, he finds no "clear and unmistakable" waiver of the right to post picket signs in the windows of employees' cars parked in the Company's parking lots and concludes that the arbitrator's decision is therefore repugnant to the Act.

The Acting General Counsel is right that this case is about whether the Union waived its members' rights to place picket signs in their cars when parked on Company property. The General Counsel recognized this in his initial deferral decision when he denied the Union's appeal of the Region's decision to defer the charges to arbitration. *See* Jnt. Ex. 8 ("It is anticipated that the question of whether the Employer properly relied on any provision of the collective bargaining agreement to require the employees to stop displaying union signs inside of their personal vehicles that were parked on company premises will be decided by the arbitrator."). The Region, too, recognized this when it dismissed the charges on the merits. Arbitrator Bornstein held that the Union waived this right in the no-picketing provision of Article G10.

However, the Acting General Counsel's further claim that Arbitrator Bornstein needed to find a "clear and unmistakable" waiver is wrong. The assertion that the Act imposes upon an arbitrator when interpreting a collective bargaining agreement that implicates statutory rights to search for "clear and unmistakable" waivers is not only without authority, but also ignores clear and unmistakably contrary decisions of the United States Supreme Court. In *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95 (1962), the Supreme Court held that a collective bargaining agreement that provided for binding arbitration, but did not contain a no-strike clause, gave rise to a limited *implied* obligation not to strike over matters that were subject to arbitration. The Court extended this principle to permit injunctive relief enforcing the implied waiver of the right to strike in *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368 (1974), holding that federal courts could enjoin the continuation of a strike in breach of an implied no-strike clause if the dispute over which the union struck was subject to arbitration under a collective bargaining agreement between the employer and the union. *Lucas Flour* and *Gateway Coal* thus stand for the principle that even the right to strike -- one of the bedrock § 7 rights -- not only does not have to be "clearly and unmistakably" waived in a collective bargaining agreement but may be waived by implication. If the right to strike can be waived by implication, there is no reason why the right to place picket signs in cars parked on an employer's property cannot be waived by explicit language interpreted by an arbitrator to that effect.

Moreover, the Acting General Counsel's apparent belief that an arbitrator must always find a "clear and unmistakable" waiver of a statutory right would introduce a highly improbable rule of construction. The reason is obvious: there is nothing for an arbitrator to interpret if there is a "clear and unmistakable" waiver. Furthermore, it is a rule that ignores the legal and factual

reality of collective bargaining. Many contractual rights touch upon statutory rights. The very negotiation of the collective bargaining agreement is the exercise of a statutory right as is the exemption from further negotiation. 29 U.S.C. § 158(d). Yet the Board has long held that negotiation over a mandatory subject of bargaining during negotiations -- even without mention in an agreement -- means that particular subject of bargaining is "contained in" the collective bargaining agreement for purposes of § 8(d) and, therefore, exempt from bargaining during the term of the contract. *See Milwaukee Spring Div.*, 268 NLRB 601 (1984); *Jacobs Mfg. Co.*, 94 NLRB 1214 (1951) (same). Thus, the duty to bargain over mandatory subjects during the term of a collective bargaining agreement can be waived without even being referred to in the contract. Grievance administration, bars on strikes and lockouts, and preservation of management rights may also impinge on statutory rights, but the Board has never held that a union and an employer must spell out every conceivable factual scenario before these provisions can be found to "clearly and unmistakably" waive § 7 rights.

The Acting General Counsel's position misunderstands the role of arbitrators in the federal labor law regime Congress established. The Supreme Court explained what arbitrators are supposed to do in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960):

> A collective bargaining agreement is an effort to erect a system of industrial self-government. … The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time. Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, "a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith." … Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops

> covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators. … Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

Id. at 580-81. This "effort" would be thwarted if the parties were required to "clearly and unmistakably" waive every § 7 right implicated by a contract provision when negotiating a collective bargaining agreement.

Ultimately, the arbitrator's waiver finding should be the end of this case. *American Freight System, Inc. v. NLRB*, 722 F.2d 828 (D.C. Cir. 1983) (Edwards, J.), explains why. There, the employer fired a worker who refused to drive a truck that he believed was unsafe. The driver, Philip McArthur, filed an unfair labor practice charge after a grievance committee rejected his claim that the company had discharged him in violation of the collective bargaining agreement. The agreement protected an employee's right to refuse to operate equipment "unless such refusal is unjustified." The Board declined to defer to the grievance committee's decision because McArthur's refusal to drive his assigned truck was protected concerted activity and, therefore, the employer violated § 8(a)(1) by discharging him. The Court reversed because:

> The obvious fallacy in the Board's analysis is its contention that there is a statutory issue apart from the contractual issue. This analytical flaw is born of the Board's total failure to consider contractual waiver doctrine. … In this case, whatever statutory right McArthur may have had to refuse to drive his truck based on his "good faith" belief that it was unsafe was clearly and unmistakably waived by … the collective bargaining agreement, which dictates that his refusal must be "justified." … This case, therefore, involves solely a contractual claim, not an unfair labor practice claim. … In other words, assuming, arguendo, that an individual employee has a right under the NLRA to refuse to work in order to pursue a contract claim that is not in fact "justified" but only supported by a "good faith" belief of wrongdoing, that alleged right was waived by the collective bargaining agreement in this case.

Id. at 832. The same is true here. There is no statutory issue independent of the contractual issue. Either the Union waived employees' rights to display picket signs in their cars or it did not. If so, the Company did not commit an unfair labor practice; if not, the Company did. The arbitrator found such a waiver. In short, as the General Counsel recognized when it deferred the charges to arbitration, once the arbitrator decided the waiver issue, there is nothing left for the Board to consider.

II. There Is Nothing "Repugnant" About Arbitrator Bornstein's Decision.

But even assuming there is something for the Board to decide and the Board's deferral standards are applicable, the ALJ's decision should still stand based on the arbitration award. The Board strongly favors deferral to arbitration as a means of encouraging parties to voluntarily resolve unfair labor practice issues. *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955); *Olin Corp.,* 268 NLRB 573, 574 (1984); *Aramark Services, Inc.,* 344 NLRB 549, 550 (2005). Under the policy announced in *Olin,* the Board will defer to an arbitration decision when (1) the arbitral proceedings appear to have been fair and regular; (2) all parties have agreed to be bound by the results of arbitration, (3) the arbitrator has considered the unfair labor practice issues, and (4) the arbitrator's decision is not clearly repugnant to the policies and purposes of the Act. *Olin*, 268 NLRB at 573-74. Thus, where the parties have agreed to be bound to an arbitrator's resolution of an issue, the Board will defer to that resolution except in those rare cases in which the arbitrator's decision is "palpably wrong". *Bell-Atlantic-Pennsylvania,* 339 NLRB 1084, 1085 (2003).

The burden is on the party opposing deferral to show that the arbitrator's decision is palpably wrong. The Acting General Counsel thus must show that it is clearly repugnant to the Act and not susceptible to an interpretation consistent with the Act. *Martin Redi-Mix,* 274 NLRB 559 (1985). As the Board noted in *Aramark,* this burden is a heavy one, and the Board

will not lightly set aside an arbitrator's resolution of an unfair labor practice issue where the contractual issue was factually parallel, and the arbitrator was presented generally with the facts relevant to the unfair labor practice issue. Thus, as the ALJ recognized, even where the Board would reach a different conclusion than that of the arbitrator, deferral is appropriate unless the arbitrator's conclusion is "not susceptible of any interpretation consistent with the Act." *Aramark*, 344 NLRB at 549 (emphasis added). As the Board has stated:

> The standard for determining whether an arbitral decision is clearly repugnant is whether it is "susceptible" to an interpretation consistent with the Act. *Olin,* 268 NLRB at 574; *see The Motor Convoy,* 303 NLRB 135 (1991). "Susceptible to an interpretation consistent with the Act" means precisely what it says. Even if there is one interpretation that would be inconsistent with the Act, the arbitral opinion passes muster if there is another interpretation that would be consistent with the Act. Further, "consistent with the Act" does not mean that the Board would necessarily reach the same result. It means only that the arbitral result is within the broad parameters of the Act. Thus, the Board's mere disagreement with the arbitrator's conclusion would be an insufficient basis for the Board to decline to defer to the arbitrator's award.

Smurfit-Stone Container Corp., 344 NLRB 658, 659-60 (2005). If Board precedent exists that supports an arbitrator's decision, it cannot be said that the decision falls outside the broad parameters of the Act. Thus, such a decision is not palpably wrong or clearly repugnant to the Act, even if other Board precedent is arguably contrary to the arbitral decision. *See Marty Gutmacher, Inc.,* 267 NLRB 528 (1983) (Board adopted judge's deferral to an arbitrator's finding despite existence of Board cases to the contrary, because other Board cases supported the finding). The Acting General Counsel does not contend that the first three prongs of the test are not satisfied, but instead contends that the award is repugnant to the Act.

Far from being "clearly repugnant" to the Act, Arbitrator Bornstein's award is consistent with it. The Union agreed in Article G10 of the collective bargaining agreement that "it will not cause or permit its members to cause, nor will any member of the Union take part in, any … picketing of any of the Company's premises …." Accordingly, Arbitrator Bornstein interpreted

the word "picketing" in Article G10 of the collective bargaining agreement to encompass employees placing picket signs in the windows of their cars parked on Company property:

> By any other name, Union members who place protest signs in their cars to inform the public of its contract concerns with Verizon are engaged in picketing. While the Union argues that placing signs in cars is not picketing because doing so only communicates a message, that is precisely what picketing is: to inform the public of the Union's concerns. Picketing does not have to be a sign on a stick.

See Jnt. Ex. 13, pg. 12.

The Board has held similar conduct to be "picketing." *See District Council 9, Int'l Brotherhood of Painters & Allied Trades*, 329 NLRB 140 (1999) (mounting a sign on an automobile outside a worksite is picketing); *Mine Workers Local 1329*, 276 NLRB 415 (1985) (placing banners on fence posts and on the back of a pickup truck is picketing); *Constr. & Gen. Laborers Local 304*, 260 NLRB 1311 (1982) (placing signs on safety cones, barricades, and a jobsite fence is picketing); *Gen. Serv. Employees Union Local No. 73*, 239 NLRB 295 (1978) (posting signs in cars' windows and windshields is picketing); *Lawrence Typographical Union No. 570*, 169 NLRB 279 (1968) (placing signs against cars and telephone poles is picketing); *United Furniture Workers*, 146 NLRB 474 (1964) (placing signs on trees and poles in front of an employer's facility is picketing); *Local 182, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers*, 135 NLRB 851 (1962) (placing signs in snow banks is picketing).

Nevertheless, the Acting General Counsel believes that Arbitrator Bornstein's decision is "clearly repugnant" to the Act because his decision could be read to prohibit conduct for which the "confrontation" element traditionally required to establish "picketing" under the Act is lacking, appealing to the Board's recent bannering decisions. *See, e.g.*, *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 355 NLRB No. 159 (2010) (holding that the nonconfrontational display of stationary banners was not unlawful picketing under § 8(b)(4)(ii)(B)).

There are at least three problems with the Acting General Counsel's argument. First, it confuses the issue of what constitutes "picketing" under Article G10 with what constitutes picketing under the Act. There is nothing in Board law that prevents an arbitrator from interpreting the word "picket" in a collective bargaining agreement provision prohibiting picketing more broadly than the Board would in an unfair labor practice case not involving such a provision.[3] This is especially so given the vacillations in Board precedent over the definition of "picketing" under the Act. *Compare Local 182, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. (Woodward Motors)*, 135 NLRB 851 (1962) ("the act of placing the usual picket signs in the snowbank abutting Employer's premises constituted picketing within the meaning of the Act"), *with United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 355 NLRB No. 159 (2010). Surely, the meaning of Article G10's prohibition on picketing means the same thing today as it meant in 1977, regardless of where the Board draws the line between what is and is not picketing.

Second, there is no obvious inconsistency between Arbitrator Bornstein's decision and the bannering cases. The Acting General Counsel likens placing signs in cars to bannering, which the Board has recently held is generally not considered picketing because it is not "confrontational" since there is no patrolling or ambulation. *See Southwest Regional Council of Carpenters and United Brotherhood of Carpenters & Joiners of Am., Locals 184 and 1498*, 356 NLRB No. 88 (2011); *Mid-Atlantic Regional Council of Carpenters*, 356 NLRB No. 19 (2010); *Southwest Regional Council of Carpenters and Carpenters Local Union No. 1506*, 356 NLRB

[3] In its arbitration brief, for instance, the Union relied primarily on cases involving § 8(b)(4) and § 8(b)(7). A "no picketing" provision of a collective bargaining agreement can have no application in such cases because those sections of the Act involve picketing of employers with no collective bargaining agreement with the union that is allegedly being picketed.

No. 11 (2010); *Southwest Regional Council of Carpenters*, 356 NLRB No. 227 (2010); *Carpenters Local Union No. 1506*, 355 NLRB No. 219 (2010); *Southwest Regional Council of Carpenters and Carpenters Local Union No. 209*, 356 NLRB No. 216 (2010);*United Brotherhood of Carpenters & Joiners of Am., Local Union No. 1506*, 355 NLRB No. 191 (2010); *United Brotherhood of Carpenters & Joiners of Am., Locals 184 and 1498*, 355 NLRB No. 188 (2010); *United Brotherhood of Carpenters & Joiners of Am., Local Union No. 1506*, 355 NLRB No. 159 (2010). However, the Board has distinguished its bannering decisions from other decisions finding picketing notwithstanding the absence of patrolling because the latter decisions involve the display of stationary signs or distribution of handbills as part of a campaign of traditional ambulatory picketing. *See United Brotherhood of Carpenters and Joiners of Am., Local Union No. 1506*, 355 NLRB No. 159, at pg. 36-40. The Board justifies this distinction because, "[f]ollowing in the footsteps of the conventional picketing which had preceded it, this conduct was intended to have, and could reasonably be regarded as having had, substantially the same significance for persons entering the Company's premises." *Id.* (quoting *Lawrence Typographical Union No. 570*, 169 NLRB 279, 284 (1968)). Moreover, the Board finds "picketing" even without patrolling where "the display was of traditional picket signs of the same type used in ambulatory picketing." *Id.*

Although it is true that Arbitrator Bornstein's written decision focuses on the issue of whether placing the signs in cars was "picketing" without mentioning the other picketing that was happening around the same time, his decision can only be understood in the context of the arguments and facts adduced at the hearing. Once this context is considered, it is apparent that Arbitrator Bornstein concluded that the placing of signs in cars parked in Company parking lots was a continuation of the picketing carried on elsewhere. The record is rife with examples of

picketing going on around the same time using the exact same signs as employees placed in their cars at the Hatfield, Westfield, and Springfield facilities. *See* Jnt. Ex. 4. Moreover, the Company argued that placing the signs in the employees' windshields was a continuation of the picketing:

> MR. TELEGEN: I think it's probably not especially surprising that the NLRB thought this was a contract issue, nor was it a statutory issue. One fact that might help you understand why we're here is the signs that were displayed in the car windows had been carried outside the Company's premises in what was indisputably picketing.
>
> THE ARBITRATOR: What do you mean, they were carried outside the Company's premises?
>
> MR. TELEGEN: The Union's members picketed outside the Company's facility before the start of the workday. And when they took down their picket line, they carried their signs -- drove them in or carried them, I'm not sure, but then displayed them in the windows. So that the conduct, although I'm not sure it's necessary to the correctness of the Company's position in this case, the fact that they were picket signs is beyond any reasonable dispute. They were in fact picket signs, which had been carried in the course of picketing. And from the Company's perspective, at least in this instance, this was a continuation of the picket line.

Jnt. Ex. 9, pg. 30-31.

This case falls well within the decisions finding the stationary display of signs to constitute picketing. Here, as in those cases, the Union was engaged in a campaign of picketing. Signs were placed in car windows both before and after the picketing occurred. *See* Jnt. Ex. 4. *Compare Lawrence Typographical Union No. 570*, 169 NLRB 279 (1968) (picketing found where strikers ceased traditional picketing and immediately began distributing handbills bearing the same message as the picket signs); *Woodward Motors*, 135 NLRB 851 (1962) (picketing found where traditional picketing ended two weeks before stationary display of picket signs began). *Cf. NLRB v. Furniture Workers*, 337 F.2d 936 (2d Cir. 1964) (picketing found where fixed picket signs were preceded by traditional picketing). Moreover, the signs that were placed

in the cars were often the exact same signs that were used in the picketing. *Compare United Mine Workers District 2*, 334 NLRB 677 (2001) (picketing found where stationary signs were the same as used in the picketing); *Iron Workers Pacific Northwest Council*, 292 NLRB 562 (1989) (same); *Constr. & Gen. Laborers Local 304*, 260 NLRB 1311 (1982) (same); *Woodward Motors*, 135 NLRB 851 (1962) (same). Thus, the conduct engaged in here was part and parcel of an area-wide picketing campaign in furtherance of a labor dispute rather than the mere placement of signs in employee vehicles on company property.

It does not matter that there had not yet been traditional picketing at the Westfield, Hatfield, and Springfield garages when the signs were placed in the cars. It would make little sense if signs placed in cars two weeks after traditional ambulatory picketing commenced at these locations would be "picketing" but not if traditional ambulatory picketing occurred two weeks after signs were placed in cars, for in both cases, the conduct is the same. In addition, there had been picketing elsewhere for which Local 2324 was responsible under the collective bargaining agreement. The collective bargaining agreement defined every single Local union in the System Council T-6 as "the Union." *See* Jnt. Ex. 2, pg. G3. Article G10, in turn, provides that "[t]he Union agrees that … it will not cause or permit its members to cause … any .. picketing of any of the Company's premises…." Accordingly, for all practical purposes, the Union here is accountable for the picketing at other locations. In any event, it would be silly to hold that placing the exact same signs in cars at one location as used in picketing at other locations was not a continuation of the picketing at those locations. Certainly, bargaining unit employees and others who saw the signs would not have understood that to be the case.

In substance the Regional Director saw the case as did the arbitrator when she wrote in her dismissal letter:

> [T]he Union's informational picketing against the Employer was an area-wide effort that began two weeks prior to the Employer's prohibition against sign posting in employee vehicles on the Employer property. Further, the directive to remove the signs at the locations at issue in your charges began one day prior to traditional picketing at two of the three locations at issue and within a couple of weeks at the third location. I note that the Union made and distributed the picket signs for the purpose of engaging in informational picketing, conduct the Union had a practice of engaging in prior to the expiration of prior contracts. Accordingly, it is reasonable to conclude that the conduct engaged in here was part and parcel of an area-wide picketing campaign in furtherance of a labor dispute rather than the mere placement of signs in employee vehicles on company property. This finding is consistent with the Board's recent case on bannering. In *United Brotherhood of Carpenters and Joiners of America (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (August 27, 2010), the Board acknowledged that there are prior Board decisions finding picketing during periods when there was no patrolling or other ambulation, and found those cases distinguishable because the display of stationary signs or distribution of handbills in those cases was preceded at the same location or accompanied at other locations by traditional ambulatory picketing and, in many instances, the same signs were displayed that had been utilized in traditional picketing. Accordingly, the Employer, relying on that portion of the parties' collective-bargaining agreement in which the Union clearly and unequivocally waived the employees' right to picket on the Employer's premises, lawfully directed employees' to remove signs from vehicles parked on the Employer's premises.

Jnt. Stip. 23; Jnt. Ex. 15.

Third, and most importantly, the Board has explicitly held that an arbitrator's award need not mesh perfectly with how the Board might decide the issue. *See Bell-Atlantic-Penn., Inc.*, 339 NLRB 1084 (2003) ("[T]he arbitrator's award need not be totally consistent with Board precedent to warrant deferral. Rather, it must not be repugnant to the Act."). *Spielberg* itself involved the Board's decision to defer even though an Administrative Law Judge concluded that the arbitrator had resolved the underlying unfair labor practice issue incorrectly. Although the Board could have found that the employer committed an unfair labor practice, it refused to consider the merits and deferred, noting, "[Deferral] does not mean that the Board would necessarily decide the issue … as the arbitration panel did. We do not pass upon that issue." 112 NLRB at 1082.

This principle is at the core of the Board's deferral doctrine. The Board's deferral policy is supported by two simple and related policy determinations. First, "national policy strongly favors the voluntary arbitration of disputes." *Olin*, 268 NLRB at 574. Second, when contract grievance disputes implicate statutory rights that are "waivable" pursuant to collective bargaining, it is appropriate to accede to arrangements reached by the bargaining parties. *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983) ("This Court long has recognized that a union may waive a member's statutorily protected rights"); *id*. at 707 n.11 ("the National Labor Relations Act contemplates that individual rights may be waived by the union so long as the union does not breach its duty of good-faith representation"); *Energy Coop., Inc*., 290 NLRB 635, 636 (1988) (relying on *Metropolitan Edison* for the proposition that a union may waive a member's statutorily protected rights).

The deferral doctrine furthers these twin aims. A collective bargaining agreement, at least when it includes an agreement to arbitrate disputes, defines the reach of many, if not most, § 7 rights of represented employees during the term of the agreement. The parties' commitment of the interpretation of the meaning of an agreement to arbitration thus is a delegation of the protection of the rights subject to the control of the union as the representative of the employees. The Board has no authority to reject a negotiated arbitration process as the means to define and protect waivable employee rights. *See Consolidated Aircraft Corp.*, 47 NLRB 694, 706 (1943) ("We are of the opinion … that it will not effectuate the statutory policy of 'encouraging the practice and procedure of collective bargaining' for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act."). Rather, the Board must accept the results of any negotiated arbitration process

unless the contract provision as interpreted sacrifices some non-waivable right of employees or is otherwise "illegal." *See American Freight System, Inc. v. NLRB*, 722 F.2d 828, 832 (D.C. Cir. 1983) ("The Board may not substitute its own interpretation of article 16 for that of the Grievance Committee." (citing *NLRB v. C & C Plywood Corp*., 385 U.S. 421, 427-28 (1967)). *See also* pp. 27-30, *infra.* There is nothing in Board law holding that employees' § 7 right to picket is not waivable or that a no-picketing provision in a collective bargaining agreement is illegal. Here, Arbitrator Bornstein did nothing more than interpret the word "picket" to include placing picket signs in employees' cars on the Company's property.

Even assuming that the "clear and unmistakable" waiver standard were relevant, the result would not change. The negotiation of an arbitration provision in a collective bargaining agreement generally is a clear and unmistakable statement that the agreement is to be interpreted by an arbitrator. If the process results in an interpretation that finds a substantively waivable statutory right to have been waived, the "clear and unmistakable waiver" standard is met, even if the agreement itself would not necessarily be read by the Board or a court to express a clear and unmistakable waiver.

That is precisely what happened here. In the collective bargaining agreement, the Union agreed that neither it nor any of its members would picket the Company's facilities. The Union also agreed that any dispute as to the "intent and meaning" of the collective bargaining agreement would be resolved by arbitration. This includes what the word "picket" means. The Union thus "clearly and unmistakably" waived the right to have the Board interpret the meaning of the word "picket" in Article G10, committing that interpretation to an arbitral forum. Arbitrator Bornstein, in turn, interpreted the word "picket" to include putting picket signs in the windows of employee cars parked on Company property. Thus, regardless of whether the Board

would find a "clear and unmistakable" waiver of employees' right to place picket signs in car windows while parked on Company owned property in the absence of Arbitrator Bornstein's award, the fact remains that Arbitrator Bornstein found such conduct to be "picketing" for purposes of Article G10[4] and, therefore, under federal labor policy the Union "clearly and unmistakably" waived that right.[5]

Deferral could have no other meaning. Every time the Board defers, it is possible that the arbitral decision interprets a collective bargaining agreement more broadly or narrowly than the Board would. But if the Board were to review the merits to determine whether the arbitrator correctly decided the unfair labor practice, the Board would no longer have a deferral policy. Thus, while *Spielberg* established the policy of deferral, it also established the propriety of deferral even though an unfair labor practice might go unremedied. *See also Andersen Sand & Gravel Co.*, 277 NLRB 1204 (1985) ("By adopting a broadly based deferral policy, as enunciated in *Olin*, the Board endorses the national labor policy favoring arbitration and achieves one of the primary objectives of the Act -- to encourage collective bargaining. Deferral recognizes that the parties have accepted the possibility that an arbitrator might decide a particular set of facts differently than would the Board. This possibility, however, is one which the parties have voluntarily assumed through collective bargaining.").

[4] For this reason, *110 Greenwich Street Corp.*, 319 NLRB 331 (1995), is distinguishable. In that case, the Board refused to defer to an arbitration award finding that an employer had "just cause" to discipline two employees for placing placards in front of the employer's building because such activity was protected under the Act. Unlike this case, the arbitrator in *110 Greenwich Street Corp.* did not find a waiver of statutory rights, but rather found that it would constitute "just cause" for discharge for an employee to exercise these rights.

[5] *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), does not suggest a different result either. *Pyett* involved the waiver of a right that exists apart from the National Labor Relations Act, namely, the right to litigate claims under the Age Discrimination in Employment Act in federal court. The issue here is whether the parties have defined in their contract the contour of their § 7 rights.

The Acting General Counsel's position in this case thus reflects the precise analytical error *Olin* sought to rectify. At bottom, the Acting General Counsel wants the Board to determine the merits of the Union's unfair labor practice charges and then contrast that determination with the arbitration award and conclude that the award is repugnant to the Act because it does not replicate what the Acting General Counsel thinks the Board would decide. But as the Board stated in *Olin*, such an approach "predictably reache[s] a decision not to defer … [and] serves only to frustrate the declared purpose of *Spielberg*..." 268 NLRB at 574.

In the end, the premise of the complaint is not really that the award is repugnant to the Act but that the Acting General Counsel wants the Board to interpret the collective bargaining agreement differently from Arbitrator Bornstein. This fundamentally mistakes the Board's role. "The Board's involvement is not in the nature of an appeal by trial de novo." *Badge Meter, Inc.*, 272 NLRB 824 (1984).

III. The Acting General Counsel Confounds The Question Whether The Interpretation Of The Collective Bargaining Agreement Is Repugnant With Whether The Contract As Interpreted Is Repugnant.

The Acting General Counsel would have the Board muck around in an area it eschews mucking: interpretation of collective bargaining agreements. *See Consolidated Aircraft Corporation*, 47 NLRB 694, 706 (1943), enf'd, 141 F. 2d 785 (9th Cir. 1944) ("it will not effectuate the policy of 'encouraging the practice and procedure of collective bargaining' for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act"). *See also NCR Corp.*, 271 NLRB 1212 (1984) ("when 'an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it,' the Board will not enter the dispute to serve the function of arbitrator in determining which

party's interpretation is correct" (quoting *Vickers, Inc.*, 153 NLRB 561, 570 (1965)). *Cf. United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987) ("To resolve disputes about the application of a collective bargaining agreement, an Arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract.").

What *Olin* stated that the Board would decline to defer to is an award which applies a collective bargaining agreement which is repugnant to the Act. Thus if an arbitrator were to find that "just cause" for discharge includes firing an employee because of his stated intention to resort to the Board in a dispute with his employer, *see Virginia-Carolina Freight Lines, Inc.*, 155 NLRB 447 (1965), the award cannot stand. This is not because he or she misinterpreted the collective bargaining agreement -- the contract might have might have clearly banned resort to the Board -- but because the collective bargaining agreement as interpreted cannot coexist with the Act.

Had the Acting General Counsel understood this analysis, *cf*. Harry T. Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 Ohio St. L.J. 23 (1985), he would have avoided a number of issues. First, as noted above, he would have realized that contractual rules of interpretation are for arbitrators, not the Board. Second, he might not have exposed his weakness in reading collective bargaining agreements: of course this collective bargaining agreement bans picketing that does not interfere with the Company's business. Article G10 of the collective bargaining agreement provides:

> The Union agrees that during the term of this Agreement, or any extension thereof, it will not cause or permit its members to cause, nor will any members of the Union take part in, any strike of or other interference with any of the Company's operations or picketing of any of the Company's premises….

Jnt. Ex. 2 (emphasis added). This provision imposes two separate obligations on the Union and its members. The first obligation is to not cause, permit, or take part in "any strike of or other interference with any of the Company's operations." The second obligation is that there will be no "picketing of any of the Company's premises." The Acting General Counsel's interpretation renders the phrase "picketing of any of the Company's premises" surplusage because if picketing must interfere with the Company's business, only the first obligation would have been expressed. Third, he would not claim that every collective bargaining agreement must take on a chameleon-like character, changing color with each administration. This language has remained unchanged in the parties' collective bargaining agreement since 1977, nine years after the Board held that placing picket signs against cars and telephone poles is "picketing", *Lawrence Typographical Union No. 570*, 169 NLRB 279 (1968), thirteen years after the Board held that placing signs on trees and poles in front of an employer's facility is "picketing," *United Furniture Workers*, 146 NLRB 474 (1964), and fifteen years after the Board held that placing signs in snow banks is "picketing", *Local 182, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers*, 135 NLRB 851 (1962). And the facts leading to the arbitration occurred in 2008 during the Bush administration. If there was any law imported into the collective bargaining agreement, it was the law as it existed then, without the bannering cases, not the law as the Acting General Counsel would have it be now. It may be that whether the collective bargaining agreement as interpreted by the arbitrator will be repugnant at one time and not at another, but that is because the law changed and not because the meaning of the collective bargaining agreement did.

This all leads to the only question the Acting General Counsel should have asked: is a collective bargaining agreement which waives the assumed right to place picket signs in car windows repugnant to the Act? The answer is obvious. Unions can waive the right to strike, to picket, and pretty clearly to put picket signs in car windows. The fact that the Acting General Counsel does not agree with the arbitrator that this collective bargaining agreement did so under the facts of this case does not matter. That is why there is deferral.

Conclusion

The Acting General Counsel's disagreement with an arbitrator's interpretation of a collective bargaining agreement is not relevant to the propriety of deferral. The complaint is nothing more than an attempt to relitigate the definition of "picketing" in Article G10 because the Union is not happy with how Arbitrator Bornstein interpreted the word. Reversing Arbitrator Bornstein's decision via through the Board would effectively gut the Board's deferral policy. The ALJ's decision should be adopted.

Respectfully submitted,

VERIZON NEW ENGLAND INC.

By its attorneys,

Arthur G. Telegen
John E. Duke
Seyfarth Shaw LLP
Two Seaport Lane, Suite 300
Boston, MA 02210-2028
Phone: (617) 946-4800
Fax: (617) 946-4801

Dated: January 17, 2012

CERTIFICATE OF SERVICE

I hereby certify that, on this date, January 17, 2012, a true and correct copy of the above document was served by electronic mail on Counsel for the General Counsel, Daniel Fein, at Daniel.Fein@nlrb.gov; on Regional Director Rosemary Pye at Region1@nlrb.gov; and on Counsel for the Charging Party, Alfred Gordon of Pyle Rome Ehrenberger P.C., at 18 Tremont St., Suite 500, Boston, MA 02108, agordon@pylerome.com, respectively.

John E. Duke